

SERVICE DATE – NOVEMBER 16, 2012

SURFACE TRANSPORTATION BOARD

DECISION AND CERTIFICATE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 1071

STEWARTSTOWN RAILROAD COMPANY—ADVERSE ABANDONMENT—IN YORK
COUNTY, PA.

Decided: November 14, 2012

Digest:¹ The Board is granting the application of the Estate of George M. Hart for authority to remove from the Board’s jurisdiction a 7.4-mile line of railroad in York County, Pa., owned by the Stewartstown Railroad Company, subject to trail use and environmental conditions.

BACKGROUND

By application filed on July 7, 2011, the Estate of George M. Hart (Estate) seeks the third-party, or “adverse,” abandonment under 49 U.S.C. § 10903 of an approximately 7.4-mile line of railroad (Line) in York County, Pa., between milepost 0.0 at New Freedom and milepost 7.4, approximately 0.2 miles east of Stewartstown.² The Line is owned by the Stewartstown Railroad Company (SRC). Notice of the application was served and published in the Federal Register on July 27, 2011 (76 Fed. Reg. 44,986).

According to the Estate, SRC was chartered in 1885 by local interests. Following construction, the Line provided freight and passenger service from the small communities of the Deer Creek Valley to and from a connection with Northern Central Railway (NCR) at New

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Before the application was filed, the Board granted various waivers and exemptions from certain regulatory and statutory requirements requested by the Estate. See Stewartstown R.R.—Adverse Aban.—In York Cnty., Pa., AB 1071 (STB served March 10, 2011) (March 2011 Decision). Among the waivers and exemptions granted was a partial exemption from 49 U.S.C. § 10904, exempting the transaction from offers of financial assistance (OFAs) to subsidize operations over the Line. In that decision the agency also postponed ruling on the Estate’s request for a “conditional” exemption from the relevant provisions of the National Trails System Act, 16 U.S.C. §§ 1241-51 (Trails Act) and waiver of the related interim trail use provisions of 49 C.F.R. § 1152.29.

Freedom. SRC's traffic base was largely agricultural, but also served a number of small manufacturing firms.

The Estate asserts that the Line suffered a major setback in 1972 when Hurricane Agnes inflicted considerable damage upon the rail bed. In the aftermath of the hurricane and the bankruptcy of Penn Central Railroad, the Pennsylvania Department of Transportation (Penn DOT) acquired the NCR line between New Freedom, Pa., and a connection with the Maryland and Pennsylvania Railroad at York, Pa., and restored that line to service. According to the Estate, the NCR line was and is SRC's only physical connection to the balance of the interstate rail network. In 1985, SRC assumed operation over NCR's trackage and resumed freight rail service. The Estate asserts that, shortly thereafter, freight shipments dwindled and SRC commenced the operation of passenger train excursions over NCR's line to supplement its income.

According to the Estate, SRC terminated its lease of the NCR line in 1992. Because no new freight operator was installed on the NCR line, freight service on that line, and, by extension, to and from SRC's Line itself, ended. Following the cessation of freight common carrier operations, excursion trains continued over the Line to and from New Freedom until the spring of 2004.³

The Estate asserts that a former president and director of SRC, George M. Hart, provided loans totaling \$352,415 to SRC over a period of years and that the loans were secured by the assets of SRC in a recorded mortgage and a judgment note (Hart Lien).⁴ The Estate contends that, according to the mortgage, full payment of the loans must be tendered immediately upon demand of the mortgagee (now, the Estate). Further, a provision contained in Mr. Hart's will instructs the executor of his estate to seek prompt repayment of the amounts loaned to SRC under the mortgage and judgment note. The Estate states that it has demanded repayment of the debt in full, but that SRC has not complied. SRC notes that it proposed a plan to repay the Estate over five years. The Estate has not agreed to any proposal involving a series of payments, on the grounds that under its mortgage, the Estate is entitled to immediate full payment, that remaining a creditor of SRC for five years would be contrary to the Estate's fiduciary obligation to its beneficiary, and that SRC is unlikely to be able to repay its debt over five years in any event.

According to the Estate, adverse abandonment is justified because: (1) there is no present or reasonably foreseeable future need for rail service on the Line; (2) it would promote the honest and efficient management of SRC; (3) it would permit the Estate to pursue its remedies at state law related to SRC's default on its debt obligations; and (4) it would enable the executor of the Estate to fulfill his legal duties to collect amounts owed to the Estate.

³ SRC states that it receives some revenue from various activities including car storage, speeder operations, and sales of scrap metal. See SRC Protest at 14; see also Application, Confidential Exhibit DD.

⁴ According to the Estate, the mortgage secures payment of \$289,702.31, the amount SRC owed Mr. Hart at the time.

In accordance with the procedural schedule set forth in 49 C.F.R. § 1152.26, SRC filed a protest to the application on August 22, 2011, asserting that: (1) it is a viable railroad business in the process of restoring itself to operation; (2) it has a link to the interstate commerce system through an adjoining railroad owned by York County, Pa. (the former NCR line); (3) it has identified at least one definite freight customer (Pen-Mar Scrap Metal Recycling Facility) and multiple prospective customers that intend to use the Line upon its return to service; (4) its presence as a freight transporter is important to the local rural economy of southern York County; and (5) there is no discernible public interest or legitimate private interest favoring its abandonment.

The Estate filed a reply to SRC's protest on September 6, 2011. The Board also received letters from various local townships and business owners in and around the County of York, Pa., all of which express opposition to the Estate's adverse abandonment application.⁵ Letters of protest were also submitted by U.S. Representative Todd Platts, Pennsylvania State Senator Michael Waugh, and Pennsylvania State Representative Stan Saylor.

We find that removing the shield of our jurisdiction by granting adverse abandonment here is consistent with 49 U.S.C. § 10903 and would be in the public interest. As discussed below, the record does not show a credible need to keep the line in the national rail transportation system. After weighing the various competing interests, including the evidence on SRC's lack of current freight rail service and prospects for future rail service, we are satisfied that SRC is unlikely to be able to restore rail service on this line and that, accordingly, granting adverse abandonment would not adversely affect rural and community development. Given the record before us here, we find that the present or future public convenience and necessity both require and permit the proposed adverse abandonment and that it is appropriate to remove the Board's jurisdiction so that the Estate can pursue all available legal remedies to obtain the money it is owed. Where, as here, the record shows no overriding Federal interest in keeping the property within the national rail system, there is a legitimate public interest in ensuring railroad creditworthiness and freeing the Estate to use all legal remedies available to it to hold the railroad accountable for its financial obligations.

PRELIMINARY MATTER

SRC raises, as a threshold issue, whether the Board is the proper forum for this dispute. Citing Canadian Pacific Ltd., et al.—Purchase & Trackage Rights—Delaware & Hudson Railway, 7 I.C.C.2d 95, n.25 (1990), SRC submits that the present dispute over the Hart Lien is a private matter that would be best resolved in a civil court proceeding. However, it is well-settled law that the disposition of rail assets that are part of the interstate rail network—including

⁵ Letters of protest were filed by: the York County Board of Commissioners, the York County Planning Commission, Stewartstown Borough, Shrewsbury Township, Internet Factory, Inc., Maryland Recycle Co., Inc., the Maryland & Pennsylvania Railroad Preservation Society, and Steam Into History, Inc.

abandonment of lines of railroad—is subject to the Board’s exclusive jurisdiction.⁶ Under 49 U.S.C. § 10501(b), the Board’s jurisdiction over transportation⁷ by rail carriers and the remedies provided under 49 U.S.C. §§ 10101-11908 regarding the regulation of rail transportation are exclusive and preempt the remedies provided under federal or state law until the Board’s jurisdiction is removed, after which the disposition or sale of railroad property may proceed under state law. See City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998). Thus, the Board is the proper forum for this dispute.

DISCUSSION AND CONCLUSIONS

Legal standard. Under 49 U.S.C. § 10903(d), the standard that applies to any application for authority to abandon a line of railroad is whether the present or future public convenience and necessity (PC&N) require or permit the proposed abandonment. In applying this standard in an adverse abandonment context, we consider whether there is a present or future public need for rail service over the line and whether that need is outweighed by other interests.⁸ As part of our PC&N analysis, we must consider whether the proposed abandonment would have a serious, adverse impact on rural and community development. 49 U.S.C. § 10903(d). We also consider the environmental impacts of the proposed abandonment, and, pursuant to 49 U.S.C. § 10903(b)(2), we must ensure that affected rail employees will be adequately protected.

The Board has exclusive and plenary jurisdiction over rail abandonments to protect the public from an unnecessary discontinuance, cessation, interruption, or obstruction of available rail service.⁹ Accordingly, we typically preserve and promote continued rail service where a carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic.¹⁰ On the other hand, we do not allow our jurisdiction to be used to shield a line from the legitimate processes of state law where no overriding federal interest exists.¹¹ If we grant an

⁶ See Chi. & N. W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) (the jurisdiction of the Interstate Commerce Commission (the Board’s predecessor agency) over rail line abandonments is exclusive).

⁷ “Transportation” includes, among other things, facilities and instrumentalities related to the movement of property, passengers, or both, by rail, including a line of railroad itself. 49 U.S.C. § 10102(9)(A).

⁸ See N. Y. Cross Harbor R.R. v. S.T.B., 374 F.3d 1177, 1180 (D.C. Cir. 2004); City of Cherokee v. I.C.C., 727 F.2d 748, 751 (8th Cir. 1984). See also Seminole Gulf Ry.—Adverse Aban.—in Lee Cnty., Fla., AB 400 (Sub-No. 4) (STB served Nov. 18, 2004).

⁹ See Modern Handcraft, Inc.—Aban., 363 I.C.C. 969, 972 (1981).

¹⁰ See Chelsea Prop. Owners—Aban.—Portion of the Consol. Rail Corp.’s West 30th Street Secondary Track in New York, N.Y., 8 I.C.C.2d 773, 779 (1992) (Chelsea), aff’d sub nom. Consol. Rail Corp. v. I.C.C., 29 F.3d 706 (D.C. Cir. 1994) (Conrail).

¹¹ See Kan. City Pub. Serv. Freight Operation—Exemption—Aban. in Jackson Cnty., Mo., 7 I.C.C.2d 216 (1990) (Kansas City). See also CSX Corp. and CSX Transp., Inc.—

(continued . . .)

adverse abandonment, our decision removes the shield of our jurisdiction, enabling the applicant to pursue other legal remedies to force the carrier off a line and sell or dispose of railroad property that would otherwise be protected as part of the national rail transportation system.¹²

PC&N analysis. Applying the above principles to this case, we find that the present or future PC&N both require and permit the proposed adverse abandonment. As explained below, there is no present need, and little likelihood of a future need, for rail service over the Line. Further, the record shows that abandonment of the Line would not adversely affect rural and community development. Accordingly, the public interest supports granting adverse abandonment to allow the Estate to pursue any available legal remedies, including dismantling of the railroad line, to obtain repayment of the money the Estate is owed.

Potential for Freight Service. The Estate asserts, and SRC concedes, that there are no current freight operations on the Line, as freight service on the Line ceased in 1992. However, the lack of current freight operations alone is not grounds for granting an adverse abandonment application. Under the PC&N test, the Board must also consider the potential for future freight rail traffic.

In its application, the Estate argues that the Line is in a state of disrepair due to deferred maintenance and has had no freight service of any kind for nearly two decades. Assuming that SRC were to rehabilitate its Line, the Estate maintains that SRC has identified no shippers that are interested in, and are willing to use, rail service. Thus, the Estate asserts that SRC has no legitimate or sustainable freight prospects. In its protest, SRC states that it has identified at least one major shipper and other potential shippers who may need future freight rail service. In its reply to SRC's protest, however, the Estate has raised questions regarding the likelihood that any of the alleged shippers would actually need to utilize the Line for freight rail service. We will now review the future shipping prospects of each prospective shipper that has been identified by SRC or has submitted a letter of opposition with the Board.

a. Pen-Mar Scrap Metal Recycling Facility (Pen-Mar)

The Maryland Recycle Company operates the Pen-Mar Scrap Metal Recycling Facility. SRC identifies Pen-Mar as a "major customer"¹³ who desires to ship over the Line in the future. SRC states that its representatives have visited Pen-Mar's facility to discuss the terms of future freight service. In support of SRC's position that there is still a need for rail service, Pen-Mar filed a letter of protest on August 22, 2011, noting that its recycling facility is located adjacent to SRC's Line in Shrewsbury, Pa., and that it anticipates a need for direct rail service within the next two years or less. According to Pen-Mar, it is attempting to develop its facility and grow its

(. . . continued)

Adverse Aban. Application—Can. Nat'l Ry. and Grand Trunk W. R.R., AB 31 (Sub-No. 38)
(STB served Feb. 1, 2002).

¹² See Conrail, 29 F.3d at 709; Modern Handcraft, 363 I.C.C. at 972.

¹³ SRC Protest at 20.

business as the economy recovers from the current recession. Pen-Mar further asserts that its preliminary discussions with SRC were in regard to obtaining suitable railcars, making arrangements to load the railcars, and obtaining rates for rail service. Pen-Mar asserts that the Board would do a great disservice to the local economy of Southern York County, and to the future of Pen-Mar's company, its employees, and customers, if the adverse abandonment is granted.

The Estate provides persuasive evidence that SRC would be unable to provide cost-competitive service to Pen-Mar, and that the prospect for rail shipments by Pen-Mar is speculative at best. In an April 2011 e-mail exchange,¹⁴ a director of SRC sought advice from a representative of another railroad regarding how to illustrate to Pen-Mar that switching to rail would be cost-competitive with truck. In response, SRC was advised that the other railroad did not think that SRC would be able to make such a showing.¹⁵ Additionally, Pen-Mar's protest letter indicates that it has not made a definite commitment to ship by SRC. Instead, Pen-Mar indicates that only "preliminary discussions" have taken place. Thus, Pen-Mar's assertions concerning its possible future need for rail service are speculative.

b. Maryland & Pennsylvania Railroad Preservation Society (M&PRPS)

In its protest statement, SRC indicates that it has previously shipped cars and material for M&PRPS, and that M&PRPS also opposes the Estate's adverse abandonment application. On August 17, 2011, M&PRPS submitted a letter of opposition asserting that its right-of-way is not connected to the national rail network and that, therefore, SRC "has been a key asset in transporting full-size historic rail equipment" to its facility. M&PRPS concludes that it would like to keep SRC's Line available as an "option for future rail deliveries of this type."

Although M&PRPS suggests that it has used SRC in the past, it fails to indicate when and in what quantities. M&PRPS does not dispute that the Line has been out of service since 1992, and does not indicate a present need for, or a present commitment to, rail service by SRC. It merely states that the SRC's Line is needed as an "option" for future rail deliveries. However, there is no evidence to indicate that M&PRPS will actually utilize the Line in the future. Based upon the record, M&PRPS has made no commitments for rail shipments, and its desire to keep SRC's Line available as an "option" for rail deliveries does not demonstrate that freight traffic will actually materialize in the future.

¹⁴ The Estate designated this information as "confidential." Although we generally attempt to avoid references to confidential or highly confidential information in Board decisions, the Board reserves the right to rely upon and disclose such information in decisions when necessary. In this case, we have determined that we could not adequately present our findings with respect to the lack of potential for future rail service without summarizing confidential information here and disclosing some more specific information elsewhere in this decision.

¹⁵ Application, Confidential Exhibit AA.

c. Internet Factory, Inc. (IFI)

Although not mentioned in SRC's protest statement, IFI filed a letter in opposition to the Estate's adverse abandonment application on August 22, 2011. IFI asserts that it plans to complete a 10+ year project in which it would acquire, recycle, and refurbish old locomotives, using proprietary green technology, and then resell or lease them. IFI states that it plans to establish its base operations in Southern York County along the SRC Line "within the next few years." Based upon the company's projections, IFI states that it anticipates shipping 12 carloads of scrap metal per year, receiving 10 carloads of parts and supplies from various railroad vendors per year, and receiving/shipping five locomotives per year, depending on demand. IFI asserts that shipping costs alone, to send and receive parts by rail, including locomotives, engines, traction motors, batteries, wheels, and truck assemblies, would significantly increase if these parts had to be moved by tractor-trailer, as special permits, escorts, and other drastic measures would be required. Therefore, IFI submits that rail service is very essential to its project's needs. IFI acknowledges that SRC has some obstacles to overcome. However, it concludes that, combined with its projected traffic, and that from other shippers, sufficient demand exists for freight rail traffic.

Even though SRC has not identified IFI as a potential shipper, we will still review its letter of opposition to determine whether there is the potential for future rail traffic over the Line. According to IFI, it hopes to establish its base operations along the SRC Line within the next few years, and anticipates shipping or receiving as many as 22 carloads of traffic and five locomotives per year (i.e., 27 revenue movements).

Based on the record evidence presented, we conclude that IFI's future need for freight service is speculative. According to IFI, it has hopes of implementing a 10+ year business project wherein it anticipates 27 revenue movements per year. However, there is no mention of when, during this 10 year phase, IFI will actually relocate its business to Southern York County. Additionally, IFI makes no definite commitment to ship over SRC's Line. It only offers a mere possibility of providing future freight traffic. Further, even if we were to assume that IFI's proposed revenue movements were to materialize, the record lacks sufficient evidence to determine whether the revenue generated from that traffic would be enough to sustain the Line. Finally, it is readily apparent that SRC is not familiar with IFI's business enterprise, as it makes no mention of the company being a potential shipper in its protest statement. In short, IFI's plans are too speculative to support requiring ongoing Board jurisdiction over the SRC Line.

d. Other Possible Shippers

In its protest, SRC identifies a few additional business entities that it asserts may desire rail service in the future. SRC claims that new business opportunities have been created by the closure of Columbia Forest Products, which was formerly served by SRC at New Freedom, Pa. According to SRC, the rail siding and railcar dock are extant and a real estate developer is marketing that property for light industrial use. In addition, SRC asserts that Mann & Parker Lumber Company (Mann & Parker), a former SRC shipper, has the potential to resume operations at a level requiring freight rail service. SRC states that, should Mann & Parker cease operations, that property would be available for development by a new entity requiring rail

service. SRC further submits that a newly constructed industrial park in the vicinity of Shrewsbury, Pa., has land with links to the interstate highway system. SRC asserts that the proximity of this industrial park to SRC's Line would provide an opportunity for significant additional development of the railroad's freight business.

Although SRC states that new business opportunities have been created by the closure of Columbia Forest Products, and that new business prospects may develop near the newly constructed business park, these business prospects are speculative. SRC does not provide any corroborating evidence of an interest in using freight rail service, such as a letter or verified statement, from Mann & Parker or any of the other shippers identified above. The Estate admits in its application that SRC's former freight customer, Mann & Parker, continues to operate adjacent to the SRC Line at New Freedom, Pa., and could ship as much as one to two inbound loads of lumber per month. According to the Estate, however, Mann & Parker currently relies exclusively on trucks for its transportation needs. The Estate submits, and SRC does not rebut, that based upon SRC's responses to the Estate's discovery requests, SRC has made no effort over the past three years to secure Mann & Parker's business. Moreover, even taking at face value a potential of one to two carloads a month, that level of use would not be enough to support continued operation of the Line.

The Estate notes in its application that, in addition to Columbia Forest Products and Mann & Parker, three former SRC shippers, Metropolitan Edison, Bull Supply Company, and The Lumberyard (also known as Wolf's Supply), also have no need for freight service on the Line because these companies have no facilities on the Line.¹⁶

Based on the record in this case, we find that SRC has failed to demonstrate a sufficiently credible need for future freight rail service. In adverse abandonment proceedings, the burden lies with the applicant to show that the carrier has no likelihood of success in preserving the line for rail service. When the applicant makes such a showing, the burden of production then shifts to the carrier to show that there is a realistic potential for rail service.¹⁷ After reviewing all of the evidence submitted by the Estate, we find that the Estate has met its burden of proof by demonstrating that there is little, if any, realistic or credible potential for future freight rail service by SRC,¹⁸ and that showing has not been persuasively rebutted.

¹⁶ Application at 23. In addition, in a filing submitted on January 25, 2012, James Riffin describes contacts with several shippers and carriers in which he claims to have explored the prospects for freight shipments on the SRC Line. Riffin himself, however, admits that these prospects are "somewhat speculative." We agree. None of the businesses Riffin claims to have contacted have come forward to provide evidence of the need for freight service, and we find Riffin's claims too indefinite and insubstantial to be accorded any weight.

¹⁷ See Denver & Rio Grande Ry. Historical Found.—Adverse Aban.—In Mineral Cnty., Colo., AB 1014, slip op. at 13 (STB served May 23, 2008) (Denver & Rio Grande Ry.).

¹⁸ See, e.g., id. at 12; Chelsea, 8 I.C.C.2d at 791-92.

SRC argues that the facts of this case are similar to those in Seminole Gulf, in which the Board denied an adverse abandonment application because the carrier was making significant attempts to attract new business for the line and had presented evidence of potential new shippers. Seminole Gulf, however, is materially distinct from this case. In denying the adverse abandonment application in Seminole Gulf, the Board stated that, although the rail carrier would “lose its only current shipper on the line in the near future, the railroad continues to operate over the line at the present time.”¹⁹ The Board further explained that “this is not a line that is inoperable or needs major repairs, and unlike many cases where adverse abandonment applications have been granted, this case involves a line that is presently carrying traffic.” Here, SRC currently has no freight traffic on its Line, nor has it had any for nearly 20 years. Moreover, by SRC’s own admission, the Line is inoperable.

Under the PC&N test, in addition to looking at the potential for freight traffic, we also look to see if the carrier is taking “reasonable steps” to attract traffic.²⁰ Here, in a verified statement, SRC’s President, David M. Williamson, concedes the Estate’s point that “SRC has made little credible effort over the past few years to secure freight traffic.” Mr. Williamson asserts that this is true only because the connecting Northern Central Rail line has been out of service. According to Mr. Williamson, “since the Steam Into History group is restoring the [NCR line], it has become realistic to begin soliciting freight business and for moving the restoration of the western end of the Line to a higher priority,” and that SRC’s “efforts to secure freight business resumed when [SRC] learned what [Steam Into History was] doing.”²¹ In addition, Mr. Williamson asserts that SRC has made “extensive efforts” to re-establish freight business by launching a new web site, meeting with potential shippers and investors, and meeting with the principals at SIH and representatives of the connecting railroads at York Railways.²² However, in its reply, SRC describes only one actual shipper contact (with Pen-Mar). Moreover, a document produced by SRC in response to a discovery request for its “current business plan” makes no mention of developing freight business. Rather, SRC’s business plan depicts SRC purely as a historic/tourist excursion attraction.²³

In addition, we find persuasive the assessment by a current SRC director of the lack of prospects for freight rail development expressed in an April 2011 e-mail to an apparent potential purchaser of the Line. In that e-mail, the SRC director, who opposes the Estate’s adverse abandonment application, nevertheless candidly acknowledges that “freight business sufficient to justify operation of the [SRC and NCR lines] . . . is just not here,” and “[t]he precious few industrial concerns left online do not ship or receive in quantities anywhere near sufficient to

¹⁹ Seminole Gulf at 5.

²⁰ See Chelsea, 8 I.C.C.2d at 779.

²¹ SRC Protest, V.S. Williamson at 14-15. Steam Into History (SIH) is a non-profit corporation whose mission is the construction and operation of an excursion train on the former NCR line.

²² Id. at 15.

²³ See Application, Exhibit O.

justify rail service.” Moreover, the SRC director explains that “[a]ny opportunities for transloading business in the region are already taken by YRC’s well-established facilities, or [by] NS in Harrisburg and CSX Transportation in Baltimore.” In sum, as he notes, “there are virtually no realistic prospects here” for future rail freight business.²⁴

Status of the NCR line

The record indicates that the NCR line, which spans roughly 19 miles between New Freedom, Pa. (where it joins the SRC Line) and York, Pa. (where it meets with other rail systems), is SRC’s only physical connection to the rest of the interstate rail network. To support its adverse abandonment application, the Estate argues that SRC’s Line does not connect with an active outlet for freight traffic, as the NCR line has been out of service for several years.²⁵ However, SRC states that York County, owner of the NCR line, has executed a lease agreement with Steam Into History (SIH). According to SRC, SIH has committed to restoring the NCR line to a minimum of Federal Railroad Administration Class I track status, which is also suitable for freight operations. Additionally, SRC states that SIH has made a commitment to facilitate freight operations over the NCR line in conjunction with its own excursion operations, thereby allowing a restored connection with York Railway, at York, Pa., and connections with both Norfolk Southern and CSXT.²⁶

On August 8, 2011, SIH filed a letter opposing the Estate’s adverse abandonment application. SIH asserts that it has entered into an agreement with York County for use of the NCR line. SIH states that its plans consist of refurbishing the line from New Freedom, Pa. (where it joins the SRC Line), to Hanover Junction, approximately nine miles of track, in order to accommodate full use of the railroad by the excursion train. SIH also asserts that “future plans exist” to refurbish the rest of the NCR line, from Hanover Junction to York, Pa. (where it connects with other rail systems). SIH states that it has been in discussions with SRC concerning the use of some of the SRC Line for the company’s purposes, and to help accommodate the future use and operation of the SRC railroad. SIH submits that refurbishment of the NCR line will allow SRC to have full and complete access to the balance of the interstate rail system. SIH states that, although its proposed use does not involve movement of freight, it is aware that use of the rail line for freight transport in the future is a possibility. It further concludes that, in its discussions with SRC, York County, and others, the potential for freight has been considered, and will be considered in the future.

Because of SIH’s statements concerning refurbishment of the NCR line, SRC asserts that it will “shortly” have an outlet to the balance of the interstate rail system via the NCR line. Although SIH notes that it is restoring the southern half of the NCR line at this time, that restoration will not provide a connection to other freight rail lines. While SIH indicates that “future plans exist” to refurbish the line from Hanover Junction to York, Pa., no definitive

²⁴ Application, Confidential Exhibit BB.

²⁵ Application at 4.

²⁶ SRC Protest at 13.

timetable has been given as to when the entirety of the NCR line might be fully restored—without which SRC would remain physically unable to reach the balance of the interstate rail network—nor does the record demonstrate the feasibility of SIH’s restoration plans.

Rural and community development. SRC submits that there is a strong public interest in preserving the Line as a freight and passenger carrier in the rural community that it serves. It further asserts that adverse abandonment would impact the surrounding rural communities by depriving them of an environmentally responsible engine of economic growth as the area struggles to overcome the effects of the current economic recession.

Although the Line is located in a rural area, we find that abandonment will not harm rural or community interests, much less have a “serious, adverse impact on rural and community development,” as the Line has been unused for freight rail service since 1992 and there is no demonstrated prospect or need for common carrier rail service by SRC in the future. See 49 U.S.C. § 10903(d); Denver & Rio Grande Ry., slip op. at 18.

Passenger Excursion Operations

The Estate submits that SRC’s main focus for the Line’s future is the resumption of excursion train operations, which do not further any federal interest in interstate commerce. In its protest, SRC does in fact state that, in addition to depriving the region of an engine of economic growth, abandonment of the Line would deny the surrounding region the economic benefits of passenger excursion operations. SRC further asserts that there would be a strong public benefit to the community by allowing SRC to continue as an operator of freight and passenger rail. Citing Denver & Rio Grande Ry., SRC notes that passenger service can factor into the PC&N analysis if revenue from existing or potential passenger service on a line might make more than a *de minimis* amount of rail freight service feasible.

However, even if passenger excursion service could be a sufficient reason to keep a line within the national rail system in a particular case, the record fails to show that the long term prospects for a sustainable passenger excursion service by SRC on the Line are sufficient to outweigh the countervailing evidence supporting a grant of adverse abandonment. Although SRC’s business plan projects an annual ridership of up to 34,000 in 2015 and 39,000 in 2030, those figures appear significantly overstated in light of SRC’s historic ridership figures (4,886 in 1986 and 15,920 in 1994).²⁷ Further, in an email to a prospective purchaser of the Line, an SRC director states that “regarding passenger ridership, from our experience as well as the operator who succeeded us on the Northern Central, I can tell you that with the possible exception of seasonal and holiday themed excursions, a sustainable ridership base has been very hard to locate once the initial excitement over a new tourist attraction dies down.”²⁸

²⁷ Application, Exhibit O. SRC’s business plan includes no ridership figures for any other years.

²⁸ Application, Confidential Exhibit BB.

Public Interest Considerations

As previously noted, the public interest is an important consideration in an adverse abandonment case. The Estate argues that there is a legitimate public interest in granting adverse abandonment here to ensure that SRC does not use the Board's "jurisdictional shield" to evade its financial obligations. SRC disagrees. SRC notes that the Estate seeks to dismantle the railroad to satisfy a private obligation. SRC also states that it has offered a proposal to repay the debt to the Estate over a five-year period, so that the railroad would not be forced out of operation, and faults the Estate for rejecting SRC's proposal. There is no record evidence, however, to suggest that SRC sought to obtain a commercial loan to repay its debt.

We agree with the Estate that, under the circumstances presented in this case, it is in the public interest to terminate Board jurisdiction to allow the Estate to pursue all available legal remedies to obtain the money that it is owed. As previously noted, the Estate has explained that under its mortgage it is entitled to immediate full payment and that remaining a creditor of SRC for five years, as SRC suggests, would be contrary to the Estate's fiduciary obligations.²⁹ Where, as here, the record shows no overriding Federal interest in keeping the property within the national rail system, there is a legitimate public interest in ensuring railroad creditworthiness and freeing the Estate to use all legal remedies available to it to hold the railroad accountable for its financial obligations. Removing our jurisdiction over the Line also is consistent with the Rail Transportation Policy (RTP) at 49 U.S.C. § 10101, which promotes sound economic conditions in transportation (§ 10101(5)) and efficient management of railroads (§ 10101 (9)) and makes clear that, where warranted, the Board should minimize the need for federal regulatory control over the rail transportation system (§ 10101(2)).

SRC relies on Yakima Interurban Lines Ass'n—Adverse Abandonment—in Yakima County, Wash., AB 600 (STB served Nov. 19, 2004) (Yakima), in which the Board denied an adverse abandonment on a line that was not in operation. SRC asserts that the Board denied the adverse abandonment in Yakima because it would have furthered only a purely private interest. Yakima, however, does not support denial of the proposed adverse abandonment here.

In Yakima, a ranch owner seeking quiet enjoyment of his land sought abandonment of a one-mile section of a rail line owned by Yakima Interurban Lines Association (YILA), which had been out of service for some time. The abandonment would have rendered the remaining portions of YILA's line on either end of the targeted segment isolated from each other. The Board recognized that the applicant landowner had a legitimate interest in the removal of YILA's track. However, the Board also found that, on balance, removal of the encumbrance on the applicant's property was not outweighed by the public interest in preserving the line where: (1) shippers had expressed an interest in using the line again; (2) the connecting Class I freight railroad opposed the abandonment; (3) the surrounding local governments not only opposed the abandonment but also had communicated their willingness to provide funds to assist with the restoration of YILA's rail line; (4) a third party rail operator stated an interest in entering into a

²⁹ The Estate also maintains that SRC would be unlikely to be able to repay its debt over five years.

contract to provide freight rail service over YILA's line; and (5) the State of Washington Department of Transportation had committed to provide financial assistance to permit Yakima County to acquire the line from YILA, clear its liens, and complete restoration of YILA's line for freight rail service.

Yakima is plainly distinguishable from this case. While in Yakima the Board specifically noted that the applicant's private interests that prompted the adverse abandonment application were legitimate,³⁰ the fact that the adverse abandonment was sought to advance the purely private interest of the applicant landowner was not a basis for denying the application. The facts that led the Board to deny adverse abandonment in Yakima, discussed above, are absent here. Specifically, although a few interested state and local entities have filed letters opposing the Estate's adverse abandonment application, SRC has received no local or state commitments to fund necessary rail line rehabilitation. Further, the Class I railroad that maintained an existing connection with YILA's line in Yakima had also protested the abandonment, while here, there is no currently functioning line of railroad that can provide a complete connection between SRC and the interstate freight rail network, and the record does not provide sufficient evidence that this will occur. Additionally, there are no current plans for any state or local entity to purchase the SRC Line. Likewise, neither SRC nor the interested state and local entities have presented a feasible plan to restore the SRC Line fully. It may also be noted that, just as the landowner's private interest in Yakima was deemed legitimate, here also the Estate has asserted a legitimate private interest: obtaining repayment of the monies SRC owes it. But even beyond that, the Estate has demonstrated that there is a legitimate public interest in ensuring railroad creditworthiness and holding SRC accountable for its financial obligations.

In sum, after weighing all the relevant factors, we conclude that the present or future PC&N both require and permit the proposed abandonment. The record indicates that SRC has no present freight traffic and no realistic future freight prospects. Given that there is no realistic potential for freight rail service by SRC, and that the record fails to show that potential passenger service provided by SRC would be sustainable, removal of the Line from the interstate rail system would not adversely impact rural and community development. In these circumstances, removing the shield of our jurisdiction to allow the Estate to pursue all available legal remedies to recover the money it is owed is in the public interest and will advance the RTP.

Environmental matters. The Board is required to consider the environmental and energy impacts of the proposed abandonment. The Estate has submitted a combined environmental and historic report with its application and notified the appropriate federal, state, and local agencies of the opportunity to submit information concerning the environmental impacts of the proposed abandonment. See 49 C.F.R. § 1105.11. The Board's Office of Environmental Analysis (OEA) has examined the environmental and historic report, verified its data, and analyzed the probable effects of the proposed action on the quality of the human environment. OEA issued an Environmental Assessment (EA) on August 12, 2011.

In the EA, OEA recommends that three conditions be placed on any decision granting

³⁰ Slip op. at 6.

abandonment authority. First, OEA states that the National Geodetic Survey (NGS) has identified five geodetic station markers that may be affected by the proposed abandonment. OEA therefore recommends that we impose a condition requiring that the Estate consult with NGS and notify NGS at least 90 days prior to beginning any activities that would disturb or destroy any geodetic station markers.

In the EA, OEA states that the Pennsylvania Historical and Museum Commission, Bureau for Historic Preservation Office (SHPO) submitted comments asserting that SRC and its associated buildings have been determined eligible for the National Register of Historic Places (National Register) and that any abandonment resulting in the demolition of buildings, bridges and the break-up of rights-of-way would have an adverse effect on this resource. The Estate contends that the SHPO does not object to the recovery of rail and associated track materials and suggests that OEA not recommend a condition barring recovery of track and track material. OEA, however, in subsequent consultation with the SHPO, determined that the recovery of such track assets would be considered an adverse effect on the resource. Accordingly, OEA recommends in the EA a condition that the Estate take no steps to alter the historic integrity of all historic properties including sites, buildings, structures and objects (including track and track material) within the project right-of-way (the Area of Potential Effect) eligible for listing or listed in the National Register until completion of the Section 106 process of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470(f).

Third, OEA states in the EA that the U.S. Fish and Wildlife Service, Pennsylvania Field Office (USFWS) in State College, Pa., submitted comments indicating that the proposed abandonment is within the range of the bog turtle, a species that is federally listed as threatened. To determine the potential effects of the proposed abandonment on bog turtles and their habitat, USFWS suggests that all wetlands in and within 300 feet of the project area should be identified and their suitability as bog turtle habitat assessed. If potential bog turtle habitat is found, efforts should be made to avoid direct or indirect impacts to those wetlands; if adverse effects are unavoidable, USFWS states that further consultation would be necessary. Accordingly, OEA recommends a condition requiring that, prior to commencement of any salvage activities, the Estate shall consult with USFWS to discuss the implementation and documentation of any field surveys required to assess potential impacts to the bog turtle to identify any appropriate mitigation measures that may be warranted, and shall report the results of this consultation to OEA.

Pursuant to 36 C.F.R. § 800.2, OEA conducted a search of the Native American Consultation Database to identify federally recognized tribes that may have ancestral connections to the project area. The database indicated no federally recognized tribes that may have knowledge regarding properties of traditional religious and cultural significance within the Area of Potential Effect of the proposed abandonment.

Public comments on the EA were due by September 8, 2011, but no comments were received. Accordingly, we will adopt the analysis and recommendations in the EA and impose,

with one modification,³¹ the three conditions recommended by OEA, including the Section 106 and USFWS conditions.³² Based on OEA's recommendations, we conclude that the proposed adverse abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

Labor protection. Under 49 U.S.C. § 10903(b)(2), "the Board shall require as a condition of any abandonment . . . under this section provisions to protect the interests of employees." However, in abandonment cases, the longstanding policy—which predates the § 10903 statutory language³³—of the Board and its predecessor, the Interstate Commerce Commission (ICC), has been to not impose employee protective conditions when authority to abandon a carrier's entire system is sought.³⁴ The Line constitutes SRC's entire system. Accordingly, no labor protection conditions will be imposed.

Offers of Financial Assistance. As noted above, we have partially exempted this adverse abandonment from the OFA provisions of 49 U.S.C. § 10904. More specifically, the Estate requested, and the Board granted, an exemption from the provisions allowing OFAs to subsidize

³¹ OEA's recommended conditions are directed solely at the Estate. To ensure compliance, however, we will impose those obligations on both the Estate and the railroad.

³² The Section 106 process, which the Board must conduct in every abandonment case, has three steps: identification of historic resources; determination of adverse effect; and development of appropriate mitigation. The only non-voluntary mitigation the Board can require, however, is documentation of the historic resources (*i.e.*, photos and archival information). See Implementation of Envtl. Laws, 7 I.C.C.2d 807, 829 (1991). Given the comments we have received from the SHPO, we are imposing a broad Section 106 condition that requires the Estate and the railroad to delay salvaging the line until completion of the historic review process. As noted, however, we understand the importance of allowing the Estate to recoup its losses through salvage of this Line as quickly as possible (assuming that the OFA process discussed below is unsuccessful). When the Section 106 condition and the USFWS consultation condition are satisfied, the Board's jurisdiction will be lifted, allowing salvage activities to take place and the Estate to be repaid. Moreover, should information emerge that delaying salvage is no longer warranted, the Estate or SRC may petition the Board to narrow the Section 106 condition or the USFWS consultation condition, or both, at that time.

³³ See, e.g., Susquehanna & N.Y. R.R. Aban., 252 I.C.C. 81, 88 (1942).

³⁴ See W. Ky. Ry.—Aban. Exemption—in Webster, Union, Caldwell & Crittenden Cntys., Ky., AB 449 (Sub-No. 3X) (STB served Jan. 20, 2011) (W. Ky. Ry.); Wellsville, Addison & Galetton R.R.—Aban. of Entire Line in Potter & Tioga Cntys., Pa., 354 I.C.C. 744 (1978); Northampton & Bath R.R.—Aban. Near Northampton & Bath Junction in Northampton Cnty., Pa., 354 I.C.C. 784 (1978) (Northampton). The ICC recognized, and the Board continues to recognize, two exceptions to this policy, neither of which applies here: when there is (1) a corporate affiliate that will continue substantially similar rail operations; or (2) a corporate parent that will realize substantial financial benefits over and above relief from the burden of deficit operations by its subsidiary railroad. See W. Ky. Ry., slip op. at 2; Northampton, 354 I.C.C. at 786.

continued rail service over the Line, on the ground that further Board regulation under the subsidy provisions of § 10904 would be fundamentally inconsistent with a determination that the PC&N require or permit withdrawal of the Board's regulatory authority. However, no party requested exemption from the provisions of § 10904 permitting OFAs to purchase, rather than subsidize, the line.³⁵

We have, in the past, denied requests to allow the filing of an OFA to purchase a line in some adverse abandonment cases. See Denver & Rio Grande Ry. In this case, however, an OFA to purchase the Line under the OFA provisions at its fair market value could be consistent with the Estate's purpose in seeking adverse abandonment (a means to obtain repayment of the railroad's debt). The Estate's rebuttal statement filed on September 6, 2011, appears to welcome a timely offer by a financially bona fide entity to acquire the Line to preserve its common carrier status.

On January 18, 2012, Riffin filed a Notice of Intent to File an OFA, a Notice of Intent to Participate as a Party of Record, and a Motion for Protective Order. In his Notice of Intent to File an OFA, Riffin states that he will propose separate offers for several pieces of the Line, but will not make an offer for any portion that does not connect to MP 0.0 (where the Line connects with the NCR line). On January 20, 2012, SRC and the Estate filed a Joint Reply in Opposition to Riffin's filings (Joint Reply). SRC and the Estate assert that Riffin's filings should be rejected and/or denied because: (1) there is no provision for the submission of a "notice of intent" to file an OFA in an abandonment application proceeding; (2) Riffin's OFA Notice and any subsequent OFA proposals are barred by the time limits set forth in 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27; (3) Riffin is ill-suited to undertake an OFA for the purposes of the legitimate preservation of rail service anywhere; and (4) there is reason to believe that Riffin's bankruptcy proceeding has not yet concluded, and that there is a strong likelihood Riffin will have insufficient assets to purchase a rail line. Riffin responded to the Joint Reply on January 25, 2012.³⁶

³⁵ On October 10, 2012, James Riffin (Riffin) filed a motion to hold this proceeding in abeyance for "30 days or so" to permit the Board to determine, in advance of a decision on the merits, whether OFAs will be permitted. On October 26, 2012, the Estate filed a reply in opposition. Because we are determining in this decision whether OFAs will be permitted, Riffin's request will be denied as moot. Riffin also asserts that SRC is advertising the use of its Line for car storage. As noted above, SRC states in its protest that it is receiving some income from car storage. See SRC Protest at 14; see supra note 3.

³⁶ On February 1, 2012, SRC and the Estate filed a joint motion to strike Riffin's January 25th reply in light of the Board's rules prohibiting a "reply to a reply." That motion will be denied. The January 20th Joint Reply, which asks the Board to reject or deny Riffin's January 18th filings, is, in effect, a motion for relief to which Riffin has a right to respond. Therefore, we will accept Riffin's January 25th reply to the Joint Reply.

Riffin's Notice of Intent to File an OFA and Notice of Intent to Participate as a Party of Record will be accepted.³⁷ That a Notice of Intent to File an OFA is not required under the Board's rules does not mean a party cannot file one if it chooses. As to the timeliness of Riffin's contemplated OFA, the Estate and SRC are correct that, under 49 U.S.C. § 10904, OFAs are to be filed within four months of the filing of an application for abandonment. Here, however, the Board's decision served on July 27, 2011, which provided notice of the adverse abandonment application (July 2011 Decision), stated that any OFA under 49 C.F.R. § 1152.27 to acquire the Line for continued rail service would be due by no later than 10 days after service of a decision granting the application, without specifically referring to the statutory deadline. Because the July 2011 Decision may have induced potential OFA offerors to believe they could file after the four-month period had passed, as a matter of fundamental fairness we will accept any OFA filed within 10 days of the service date of this decision, as the July 2011 Decision indicated.³⁸

Trail Use. On August 1, 2011, the York County Rail Trail Authority (YCTA) filed a request for the issuance of a Public Use Condition and a Certificate or Notice of Interim Trail Use (CITU).³⁹ Shortly thereafter, Hopewell Township, Shrewsbury Borough, and Shrewsbury Township joined in YCTA's request.

In its rebuttal statement filed on September 6, 2011, the Estate states that, if no financially bona fide entity comes forward in a timely manner to acquire the SRC Line in the interest of preserving its legally "active" common carrier status, then "the Estate has no objection to efforts to acquire possession of the SRC Line via the Board-administered interim trail use provisions, provided . . . that trail use negotiations are conducted promptly, in good faith, and in a manner that would not defraud SRC's creditors."⁴⁰ In a letter filed on February 27, 2012 (February 27 filing), SRC clarifies that it agrees to negotiate with YCTA for interim trail use/ rail banking for all or any part of the Line, under certain circumstances.⁴¹

³⁷ By decision served April 25, 2012, Riffin's Motion for Protective Order was denied on the ground that a protective order was already in place.

³⁸ We do not address here the Estate's and SRC's arguments regarding Riffin's fitness (or not) as an OFA offeror, as the financial responsibility of an OFA offeror is assessed only after an offer is submitted. See 49 C.F.R. § 1152.27(e).

³⁹ In the July 2011 Decision, the Board stated that public use requests would not be entertained in this case. Thus, we address only its request for a CITU.

⁴⁰ In light of the Estate's agreement to interim trail use, its previous request for a "conditional" exemption from the relevant provisions of the Trails Act and waiver of the related interim trail use regulations is denied as moot. See March 2011 Decision, slip op. at 5.

⁴¹ Specifically, SRC stated that it agrees to negotiate for interim trail use, conditioned upon the following: (1) SRC is permitted to continue negotiations with a prospective purchaser of a portion of its rail Line for continued rail service with such transaction, if consummated, taking precedence over interim trail use/ rail banking negotiations; (2) issuance of a CITU is predicated upon SRC's belief and understanding that it has fee simple ownership of the real property underlying the tracks; and (3) if the Board, in fact, issues a decision granting adverse abandonment, a historic preservation condition is imposed barring any removal of track,

(continued . . .)

The Board's role under the Trails Act is limited and largely ministerial. Citizens Against Rails-to-Trails v. STB, 267 F.3d 1144, 1151-52 (D.C. Cir. 2001); Goos v. ICC, 911 F.2d 1283, 1295 (8th Cir. 1990). Here, YCTA has satisfied the requirements for interim trail use/rail banking by providing a statement of willingness to assume financial responsibility for the Line and acknowledging that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service. Moreover, SRC has indicated it agrees to interim trail use negotiations under certain circumstances, and those circumstances appear to have been met. The Estate also has consented. Because YCTA's request complies with the requirements of 49 C.F.R. § 1152.29 and SRC and the Estate are willing to negotiate for interim trail use, a CITU will be issued. See Chelsea Prop. Owners—Aban.—Portion of the Consol. Rail Corp.'s West 30th St. Secondary Track in N.Y.C., N.Y., AB 167 (Sub-No. 1094A), slip op. at 8 (STB served June 13, 2005) (Chelsea).⁴² The parties may negotiate an interim trail use agreement for the Line during the 180-day period prescribed below. If an interim trail use agreement is reached, the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(c)(2) and (h). Nat'l Trails Sys. Act & R.R. Rights-of-Way, EP 702 (STB served Apr. 30, 2012) (effective May 30, 2012). If no agreement is reached within 180 days, the Line may be fully abandoned, subject to the other conditions described below. 49 C.F.R. § 1152.29(c). Use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

It is ordered:

1. The Estate's adverse abandonment application is granted, subject to the conditions that the Estate and SRC shall: (1) consult with NGS at least 90 days prior to commencement of salvage activities that would disturb or destroy any geodetic station markers; (2) take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects (including track and track material) within the project right-of-way that are eligible for listing or listed in the National Register of Historic Places until the Section 106 process of the NHPA has been completed; report back to OEA regarding any consultations with the SHPO,

(. . . continued)

structures, or any consummation of abandonment authorization until the completion of reviews required by Section 106 of the National Historic Preservation Act. SRC also requests that Preservation Pennsylvania be granted the consulting party status requested in its filing on August 8, 2011, by letter dated July 28, 2011.

⁴² On March 6, 2012, Riffin filed a letter requesting that the Board decline to entertain requests for interim trail use/rail banking because no requests for a trail use condition were filed by August 22, 2011. Riffin also asserts that no briefs were submitted addressing the issue of whether interim trail use is appropriate in adverse abandonment proceedings. We will deny Riffin's request. As discussed above, YCTA filed a request for the issuance of a CITU on August 1, 2011, and, as we previously noted in Chelsea (slip op. at 8), "it is not apparent how the adverse abandonment process could be thwarted by the issuance of a CITU when the third-party abandonment applicant, the railroad, and the prospective trail user all concur in the request for a CITU."

other Section 106 consulting parties, or the public; and refrain from all salvage activities related to abandonment (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition; and (3) consult with the USFWS prior to commencement of any salvage activities to discuss the implementation and documentation of any field surveys required to assess potential impacts to the bog turtle, and to identify any appropriate mitigation measures that may be warranted; report the results of this consultation in writing to OEA prior to the onset of salvage activities; and refrain from any salvage activities related to abandonment (including removal of tracks and ties) until the consultation process has been completed and the Board has removed this condition.

2. The Estate's request for a "conditional" exemption from the relevant provisions of the Trails Act and waiver of the related interim trail use regulations is denied as moot.

3. YCTA's request for a CITU, under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29, for the Line is granted.

4. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.

5. Interim trail use/rail banking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities described in ordering paragraph 4 above.

6. If an agreement for interim trail use/rail banking is reached by May 15, 2013, the parties shall jointly notify the Board within 10 days that an agreement has been reached, 49 U.S.C. § 1152.29(d)(2) and (h), and interim trail use may be implemented. If no agreement is reached by that time, the abandonment authority granted in this decision and certificate shall be fully effective, provided the conditions imposed above are met. See 49 C.F.R. § 1152.29 (c)(1).

7. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the rail line covered by the interim trail use agreement, it must send the Board a copy of this decision and certificate and request that it be vacated on a specified date.

8. An OFA under 49 C.F.R. § 1152.27(c)(1) to allow rail service to continue must be received by the railroad, the Estate, and the Board by November 26, 2012, subject to time extensions authorized under 49 C.F.R. § 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,600. See Regulations Governing Fees for Serv. Performed in Connection With Licensing & Related Serv.—2012 Update, EP 542 (Sub-No. 20) (STB served July 27, 2012).

9. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

10. Provided no OFA has been received, this decision and certificate will be effective on December 16, 2012.

11. The one-year time limit on the Estate’s filing a notice of consummation under 49 C.F.R. § 1152.29(e)(2) is waived.

12. Riffin’s motion to hold this proceeding in abeyance is denied as moot.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman. Vice Chairman Mulvey commented with a separate expression. Commissioner Begeman dissented with a separate expression.

VICE CHAIRMAN MULVEY, commenting:

Adverse abandonments are among the more difficult matters that come before the Board. In these cases, the Board must decide whether to end a rail carrier’s right to provide service over its line—against that carrier’s wishes. The Board carefully considers whether there is convincing evidence of a present or future public need for rail service over the line. The Board’s inquiry typically turns to whether there is a realistic possibility for future freight rail traffic. In this case, I agree with the Decision’s conclusion that renewed rail service is unlikely given the line’s inoperable physical status, the lack of traffic over the last 20 years, and the absence of a realistic chance for future traffic.

In adverse abandonment cases, the Board has gone to great lengths to give the benefit of the doubt to the rail carrier’s expectations for future traffic. For example, in Norfolk Southern Railway—Adverse Abandonment—St. Joseph County, Ind., AB 290 (Sub-No. 286) (STB served Feb. 14, 2008), the Board denied an adverse abandonment, despite a statement from the shipper on the line that it did not intend to use rail. Although I ultimately disagreed with the Board’s decision in St. Joseph County (because I believe the Board erred in finding that there was a potential for future traffic given the shipper’s statements), I am comfortable that the Board has given the benefit of the doubt to SRC in this case.⁴³ Weighing all of the facts, the Board has determined that there are simply too many obstacles to the resumption of rail service, including, but certainly not limited to, the carrier’s inability to proffer anything other than speculative future business possibilities.

⁴³ See Norfolk S. Ry.—Adverse Aban.—St. Joseph Cnty., Ind., AB 290 (Sub-No. 286), slip op. at 5-6 (STB served Aug. 27, 2008). The line was finally permitted to be abandoned recently when, after years of continued dormancy on the line, the applicant again sought adverse abandonment. Norfolk S. Ry.—Adverse Aban.—St. Joseph Cnty., Ind., AB 290 (Sub-No. 286) (STB served Apr. 17, 2012).

I also believe that there is a public interest in ensuring that SRC does not use the Board's auspices as a shield against the repayment of a legitimately incurred debt. The RTP directs the Board to regulate in such a manner to foster sound economic conditions in transportation and encourage efficient management of railroads.

COMMISSIONER BEGEMAN, dissenting:

I disagree with the Board's decision to grant the adverse abandonment that would require the dissolution of the Stewartstown Railroad Company's (SRC) rail line in York County, Pa.

The record shows that a number of parties are opposed to the Board granting an adverse abandonment here. The record also shows that several potential shippers have expressed interest in obtaining freight rail service from SRC, while others consider even the possibility of rail service to be an important factor in promoting the area's community and economic development efforts. In fact, the only party that has weighed in to support abandonment is the applicant itself, which is seeking to fill the coffers of an estate's beneficiary—a matter that the Board should not have a role in one way or the other, let alone be the overarching policy objective that it appears to be in this decision.

I do not read, nor can I interpret, the rail transportation policy in 49 U.S.C. § 10101 or any other parts of the Board's governing statute to allow it to force a rail line abandonment over the clear objections of the carrier, local government officials, potential shippers, and other interested parties when there isn't an overriding and compelling public purpose for which the line in question is needed. Yet this adverse abandonment has little to do with the public good, but instead serves only private interests.

Moreover, if, as this decision states, "there is no overriding Federal interest in keeping the property within the national rails system," and the "present and future public convenience and necessity both require and permit the proposed adverse abandonment," why should offers of financial assistance (OFA) to buy and operate that very same line even be entertained? After all, this is not a routine abandonment application when a rail carrier has asked to abandon its own line, which the statute then calls for commencement of the OFA process. This is an adverse abandonment case for which Board approval here is premised on a determination that there is so little need for the line that its abandonment is not only permitted but required. In this case, either there is a need to retain the rail line, which the current owner and almost all parties of record advocate, or there is no need for the line, period, as the rationale of this decision would suggest. It cannot be both.

The record shows that the carrier, prospective rail shippers, local government officials, and others support maintaining the rail line. As such, I believe doing so is the approach that is in the true public interest.